No. 16-1027

In The Supreme Court of the United States

RYAN AUSTIN COLLINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a home, and search a vehicle parked a few feet from the house.

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INTEREST OF *AMICUS*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing *pro bono* legal representation to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. At every opportunity, The Rutherford Institute will resist the erosion of fundamental civil liberties that many would ignore in a desire to increase the power and authority of law enforcement. The Rutherford Institute believes that where such increased power is offered at the expense of civil liberties, it achieves only a false sense of security while creating the greater dangers to society inherent in totalitarian regimes.

The Rutherford Institute is interested in this case because the Institute is committed to ensuring the continued vitality of the Fourth Amendment. The expansion of the automobile exception to any

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties received timely notice of the intent to file this brief under Rule 37, and provided their written consent.

situation involving a vehicle or vehicle identification number will allow the exception to swallow the rule. Accordingly, the Supreme Court of Virginia erred when it applied the automobile exception to the Fourth Amendment warrant requirement in this situation, where a vehicle was not searched. Such a sweeping application of the automobile exception would effectively sanction law enforcement to cross constitutionally protected thresholds without a warrant and simply cite the automobile exception as justification for their conduct.

SUMMARY OF THE ARGUMENT

This case has focused on the parameters of the automobile exception, but properly interpreted the exception should not apply at all here.

The automobile exception has been broadly construed, but it has its limitations. It was first created to allow the warrantless search of vehicles because of the uniquely mobile nature of automobiles. But a search ***of*** a vehicle is vastly different than a search ***for*** a vehicle, and the policy justifications underlying the exception simply do not apply to searches for vehicles.

ARGUMENT

I. THE AUTOMOBILE EXCEPTION APPLIES TO WARRANTLESS SEARCHES *OF* A VEHICLE AND CANNOT JUSTIFY A SEARCH *FOR* A VEHICLE.

As Justice Mims stated in his dissent below, "[t]he automobile exception permits a warrantless search ***of*** a vehicle, not ***for*** a vehicle." *Collins v. Virginia*, 790 S.E.2d 611, 622 (Va. 2016) (emphasis added) (Mims, J., dissenting).

The exception was born in a Prohibition-era case of a warrantless search of an automobile suspected of transporting liquor. *Carroll v. United States*, 267 U.S. 132 (1925). In that case, prohibition agents had probable cause to believe bootleggers were using a vehicle to smuggle liquor. *Id.* at 135-36. Upon searching the vehicle, they found 68 quarts of whisky and gin concealed in the upholstering. *Id.* at 136. Chief Justice Taft, writing for the majority in that case, examined the history of the Fourth Amendment and found that, contemporaneously with its adoption, Congress distinguished between "the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant." *Id.* at 151. The Court thus created an exception for a warrantless

search for contraband goods "concealed and illegally transported ***in*** an automobile or other vehicle." *Id.* at 153 (emphasis added); *see also United States v. Ross*, 456 U.S. 798, 809 (1982) ("[T]he exception to the warrant requirement established in *Carroll* . . . applies only to ***searches of vehicles*** that are supported by probable cause.") (emphasis added). That justification does not apply here, where no vehicle was searched.

A. The Automobile Exception Does Not Apply Simply Because a Vehicle Was Uncovered in a Search.

The only thing searched in this case was the tarp covering a motorcycle. Under these facts, the automobile exception is irrelevant to the legality of the search.

A simple illustration makes the point: if, in place of the motorcycle, the tarp revealed a stolen stereo, or bag of cocaine, or any other type of contraband or illegal substance, even if those items were on wheels or in a wagon, the automobile exception could not be invoked.[2] The fact that police were looking for a motorcycle rather than these

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[2] The default rule under this Court's precedent is that "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." *Ross*, 456 U.S. at 822-23 (citing *Robbins v. California*, 453 U.S. 420, 427 (1981)).

other items does not change the analysis; "[i]t is an elementary maxim that a search, seizure or arrest cannot be retroactively justified by what is uncovered." *United States v. Como*, 340 F.2d 891, 893 (2d Cir. 1965). Put another way, it is the nature of a search, not what is uncovered, on which constitutionality turns. *See United States v. Garcia*, 605 F.2d 349, 352 (7th Cir. 1979) (Fourth Amendment search was of defendant's luggage, in which heroin was found); *United States v. Canada*, 527 F.2d 1374, 1376 (9th Cir. 1975) (Fourth Amendment search was of defendant's suitcase, which revealed large sums of cash); *United States v. Bulgier*, 618 F.2d 472, 473 (7th Cir. 1980) (Fourth Amendment search was of defendant's bags, where police found cocaine); *United States v. Carhee*, 27 F.3d 1493, 1495-96 (10th Cir. 1994) (Fourth Amendment search was of defendant's briefcase, which was carrying cocaine).

This Court's Fourth Amendment jurisprudence is replete with application of the automobile exception to warrantless searches of vehicles and containers found inside them. *See, e.g., Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (warrantless search of a vehicle uncovering a large quantity of cocaine was proper under the automobile exception); *California v. Acevedo*, 500 U.S. 565, 580 (1991) (warrantless search of a closed container within a vehicle was proper under the automobile exception even if officers lacked probable cause to

search the entire car); *Ross*, 456 U.S. at 825 (warrantless search of a vehicle and subsequent search of a container therein was proper under the automobile exception); *Chambers v. Maroney*, 399 U.S. 42, 52 (1970) (warrantless search of a vehicle already in the physical custody of police was proper under the automobile exception).

But the Court has never applied the exception wholesale to a case simply because an automobile figured in a search. To the contrary, as Justice Stewart stated more than four decades ago, "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire*, 403 U.S. 443, 461 (1971). Nor has the Court ever used such broad or expansive language in describing the exception such that it would apply to the search here. Were the Court to hold the exception to apply in these circumstances, it would be broadening its precedents and creating a whole new exception to the warrant requirement.

The fact that the automobile exception does not apply to examination of a vehicle identification number ("VIN") proves the point. Searches of VIN numbers are not analyzed under the exception even though they are found on an automobile. To the contrary, this Court has found VIN numbers to be unprotected because they are placed in plain view on the automobile. *New York v. Class*, 475 U.S. 106 (1986). Although an automobile was involved in the

search in *Class*, the automobile exception did not factor into the Court's analysis. The Court simply found that "[b]ecause of the important role played by the Vehicle Identification Number ... in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to ensure that the VIN is placed in plain view, there is no reasonable expectation of privacy in the VIN." *Id.* at 114. This is not to say that a search for a VIN number is always constitutionally permissible, only that the happenstance of the search involving an automobile does not by definition give rise to an automobile exception analysis.[3]

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[3] Lower courts, too, recognize limits to the automobile exception. *United States v. Ortiz*, 878 F. Supp. 2d 515, 536 (E.D. Pa. 2012) ("The automobile exception does not apply to permit the government's warrantless installation and monitoring of a GPS tracking device."); *United States v. Fields*, 456 F.3d 519, 524-25 (5th Cir. 2006) ("[W]e have concluded that automobile exception may not apply when a vehicle is parked at the residence of the criminal defendant challenging the constitutionality of the search."); *United States v. O'Connell*, 408 F. Supp. 2d 712, 723 (N.D. Iowa 2005) ("Because the van's immobility was readily apparent ... the automobile exception does not apply."); *United States v. Ellison*, 462 F.3d 557 (6th Cir. 2006) (addressing whether an individual has a reasonable expectation of privacy in his license plate without applying the automobile exception).

Here, the mere presence of a motorcycle cannot refashion this search of a tarp into a search that warrants the application of the automobile exception. The cases cited by the majority in the decision below are either inapposite or wrong. *See Collins*, 790 S.E.2d at 621 n.11 (citing four cases for the proposition that "courts typically describe [a] search [involving a tarp] as a search of the contraband rather than a search of the tarp itself"). Three of those cases turned on whether a person could have a legitimate expectation of privacy in objects or things in public places such that the Fourth Amendment would apply. *See State v. Allen*, 166 P.3d 111, 115-16 (Ariz. 2007) (lifting of car cover of vehicle parked in public parking lot was not a Fourth Amendment search); *State v. Tegland*, 344 P.3d 63, 69 (Or. App. 2015) (no Fourth Amendment search of a tarp covering a shelter blocking a public sidewalk); *United States v. Rosado*, No. 93 Cr. 785 (RPP), 1994 WL 285878, at *4 (S.D.N.Y June 28, 1994) (Fourth Amendment did not apply to lifting of tarp covering car in public garage). Here, there is no question but that the Fourth Amendment applies; the question is whether an exception also does.

In the fourth case, *State v. Emmons*, 386 N.E.2d 838 (Ohio App. 1978), the Ohio Court of Appeals upheld the constitutionality of a warrantless search of a tarp covering two motorcycles parked in a private driveway. But the court in that case, like the court below here, simply

assumed that the automobile exception applied without distinguishing between a search for a vehicle and the search of a vehicle. *See id.* at 844 (citing *Cady v. Dombrowski*, 413 U.S. 433, 442 (1973), an automobile exception case, for the proposition that "the procedure followed here was not unreasonable within the meaning of the Fourth Amendment"). The court in *Emmons* got it wrong.

Were the automobile exception to apply to this situation, police could effectively shirk the warrant requirement by invoking the automobile exception in any and all circumstances involving a vehicle. Such a broad expansion of the exception cannot stand. *See Boyd v. United States*, 116 U.S. 616, 635 (1886) ("[I]llegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.").

B. The Automobile Exception Was Created To Address Concerns that Do Not Apply to this Type of Search.

This Court originally fashioned the automobile exception in response to the uniquely mobile nature of vehicles as compared to other searchable things:

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth

> Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure . . . and . . . a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Carroll, 267 U.S. at 153.

Later, a second justification emerged: "a reduced expectation of privacy . . . [in] a licensed motor vehicle [because it is] subject to a range of police regulation inapplicable to a fixed dwelling." *California v. Carney*, 471 U.S. 386, 393 (1985); *see also Cady*, 413 U.S. at 442 ("The constitutional difference between searches of and seizures from houses and similar structures and from vehicles stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband.").

Cognizant of these rationales for the automobile exception, the Ninth Circuit found the search of a car cover unconstitutional in a closely analogous case. In *United States v. $277,000.00 U.S. Currency*, 941 F.2d 898 (9th Cir. 1991), the

government obtained a civil forfeiture of a Dodge Ram Charger and $277,000 found in the vehicle, which was covered and parked in the backyard of a home when the police conducted the search. After uncovering the Charger and locating the VIN, the police believed the vehicle was stolen. *Id.* at 899-900. The government contended that "the officers were justified in removing the cover[] from the vehicle[] without probable cause to inspect for the VIN[]." *Id.* at 901. The court disagreed, holding that "the removal of the car cover without probable cause was an unlawful search." *Id.* at 902.

While the court's determination thus turned on a finding of probable cause, its analysis of the automobile exception considerations is instructive. First, the court noted that the vehicle at issue was not being driven on a road; it was parked in a backyard. *Id.* Accordingly, the concern of mobility did not apply. *See also Coolidge*, 403 U.S. at 461 n.18 (the automobile exception does not apply to "a warrantless search of an unoccupied vehicle, on private property and beyond the scope of a valid search incident to an arrest"). Second, "[t]he occasion for the inspection was not brought about by traffic violations." *$277,000.00 U.S. Currency*, 941 F.2d at 902. Therefore, the search did not implicate the justification around public regulation of vehicles.

So, too, here. The motorcycle was parked and covered in the curtilage of a home. There was no moving violation or other traffic infraction at play.

In these circumstances, mobility and the necessity of vehicle regulations cannot be used as after-the-fact justifications for a search that did not involve a vehicle but simply uncovered one.

CONCLUSION

"The automobile exception . . . is coming close to swallowing the rule of the warrant requirement." Kendra Hillman Chilcoat, *The Automobile Exception Swallows the Rule:* Florida v. White, 90 J. Crim. L. & Criminology 917, 950 (1999-2000). Finding that a search meets the automobile exception merely because a vehicle is found would further distort the bounds of what was intended to be a "specifically established and well-delineated exception[]" to the *per se* unreasonableness of a search conducted outside the judicial process. *Katz v. United States*, 389 U.S. 347, 357 (1967). This the Court should not do.

Respectfully submitted,

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